

### **Remarks**

This amendment is submitted in response to the Office Action mailed 8 July 2004, in connection with the above-identified application (hereinafter, the "Office Action"). The Office Action provided a three-month shortened statutory period in which to respond, ending on 8 October, 2004. Submitted herewith is a Petition for a Three-Month Extension of Time extending the due date to 8 January 2005. Accordingly, this amendment is timely submitted.

Claims 1 through 24 are currently pending. Applicant respectfully requests the entry of the amendments to claim 1. Applicant respectfully submits that the amendments to the pending claims and the new claims do not introduce new matter. More specifically, the basis for the amendment to claim 1 can be found in paragraph 13 of the application as published.

### **Claims rejections under 35-USC §112**

Claim 1 has been amended to more specifically define the range of claimed elements.

The use of "up to about X %" in Claims 10, 12, 14, 19 – 20 and 22, includes the lower limit of 0%.

The use of "about" in the claims is proper. According to MPEP 2173.05(b), "The fact that claim language, including terms of degree, may not be precise, does not automatically render the claim indefinite under 35 U.S.C. 112, second paragraph. *Seattle Box Co., v. Industrial Crating & Packing, Inc.*, 731 F.2d 818, 221 USPQ 568 (Fed. Cir. 1984). Acceptability of the claim language depends on whether one of ordinary skill in the art would understand what is claimed, in light of the specification. . . The term "about" used to define the area of the lower end of a mold as between 25 to about 45% of the mold entrance was held to be clear, but flexible. *Ex parte Eastwood*, 163 USPQ 316 (Bd. App. 1968).

Thus, Applicants respectfully submit that these rejections under 35 U.S.C. §112 have been overcome, and the claims are in condition for allowance.

### **Claims rejections under 35-USC §102(b)**

The Examiner has rejected claims 1-9, 11-20 and 22-24 under 35-USC §102(b) as being anticipated by Liebrecht, et al. (United States Patent Number 6,106,874). Liebrecht relates to a beverage as a source of calcium (abstract). Liebrecht specifically uses a depectinized fruit juice (specification and claim 1). The present invention in ¶ 7 states "There is a need, therefore, for palatable fortified fruit juice based beverage compositions that can be produced simply and efficiently without the use of specially processed ingredients, stabilizers, or other additives", thus excluding the use of depectinized fruit juice.

Applicant cannot find a mention of arabinogalactan in Liebrecht, as indicated by the Examiner.

Thus, in view of the foregoing arguments, Applicant respectfully requests that these rejections under 35 U.S.C. §102(b) be withdrawn.

### **Claims rejections under 35-USC §103**

The Examiner has rejected Claim 10 under 35 USC §103 Liebrecht in view of Burke (GB 2335134A). As admitted by the Examiner, Liebrecht does not disclose the use of whey protein hydrosylates. Applicant believes that Liebrecht does not apply to the present invention for the reasons stated above. Turning to Burke, Burke relates to a Carbonated Sports Drink of high caloric value. Further, Burke states that protein hydrosylates have a problem that they tend to precipitate (page 3, lines 22-28), and thus need specific levels of specific carbohydrates to prevent this precipitation. Further in the present application in ¶ 5 it describes that “The development of fruit juice based beverages containing proteins, carbohydrates, vitamins, and minerals is very difficult. The interaction of the ingredients, particularly the protein with the minerals and other ingredients, often cause the protein to precipitate and frequently cause the entire composition to become very viscous or to gel. Similarly, these interactions may change the physical or chemical properties of the composition in a way that adversely affects the taste, color, odor, mouth-feel and other physical properties of the composition. These adverse changes may occur at any time but are particularly likely when the composition is heated during processing or when the composition sits on the shelf for extended periods.

There is no motivation to combine Liebrecht and Burke since Liebrecht is specifically for providing calcium supplementation and Burke is provided as a carbonated sports drink for people engaged in physical activities. Applicant submits that even if the skilled person were to combine the teaching of Liebrecht and Burke, the solution proposed by Applicant would not be achieved since they still would not teach how to combine the ratio of ingredients claimed in Claim 10, nor a clear, palatable beverage, without precipitate of the protein..

The Examiner has rejected Claim 21 under 35 USC §103 Liebrecht in view of Harado (JP 404311378A). Applicant believes that Liebrecht does not apply to the present invention for the reasons stated above. Turning to Harado, Harado discloses a polyfructan containing liquid composition using inulin. Specifically, the inulin must be derived from Helianthus tuberosus L. by using a fructose transferase derived from yeast. Not a limitation of the present invention.

There is no motivation to combine Liebrecht and Harado since Liebrecht is specifically for providing calcium supplementation and Harado deals with fiber supplementation. Each designed to address very different issues.

Applicant submits that even if the skilled person were to combine the teaching of Liebrecht and Harado, the solution proposed by Applicant would not be achieved. As described above regarding ¶ 5, that “The development of fruit juice based beverages containing proteins, carbohydrates, vitamins, and minerals is very difficult. The interaction of the ingredients,

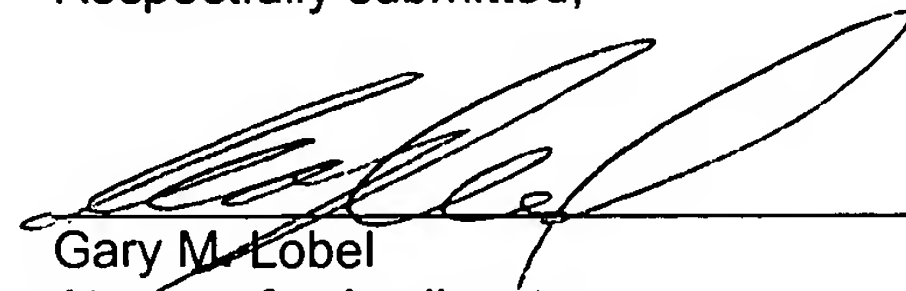
particularly the protein with the minerals and other ingredients, often cause the protein to precipitate and frequently cause the entire composition to become very viscous or to gel.” Therefore, the combined references would not teach or suggest how to make a clear, palatable beverage, without precipitate of the protein.

Thus, in view of the foregoing arguments, Applicant respectfully requests that these rejections under 35 U.S.C. §103 be withdrawn.

Applicant respectfully requests reconsideration of the present application. If a telephone interview would be of assistance in advancing the prosecution of the application, Applicants’ undersigned attorney invites the Examiner to telephone him at the number provided below.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Gary M. Lobel', is written over a horizontal line.

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Date: 17 December 2004